STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 25, 2014
v	No. 319731 Genesee Circuit Court
STEVEN JAMES WEBSTER, Defendant-Appellant.	LC No. 12-030602-FC

Before: O'CONNELL, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of first-degree premeditated murder (2 counts), MCL 750.316(1)(a), felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

I. FACTUAL BACKGROUND

On January 19, 2012, Flint Police Officers discovered the bodies of Amyre Aikins and Oscar Knuckles, Jr. in an unlit parking lot. In addition to the bodies, the police also discovered a burning Oldsmobile Alero.[1] Aikins's body was found approximately 25 feet north of the Alero. She was lying on her back with her arms above her head. Her shirt was pulled up, exposing her breasts. There was blood around her neck and mouth. An autopsy showed that she had been shot six times and had gunshot wounds on her abdomen, chest, forearm, upper back, middle back, and shoulder. The police recovered some bullet fragments and seven spent shell casings from the scene. A firearm examiner testified that several shell casings recovered from the scene were fired by a .380-caliber semiautomatic pistol. The gun was recovered several days later, when defendant fired it at the police while trying to avoid being detained. Defendant admitted that the gun recovered by the police was the same gun he discharged seven or eight times into the passenger door of a vehicle Aikins was apparently sitting inside of.

[1] The Alero belonged to Aikins's twin sister.

Knuckles, Jr.'s body was found approximately 40 feet north of the Alero. His pants and underwear were missing, and he had a very large wound on his left temple. There was shotgun wadding around his body. An autopsy of Knuckles, Jr. established that he had been shot three times by a shotgun. He had shotgun wounds on his chest, abdomen, and head. The shotgun that fired the slugs that killed Knuckles, Jr. was recovered from codefendant William Evans's home, and DNA testing established that codefendant was a major donor of the DNA on the shotgun. Further, a firearm examiner testified that the shells recovered from the scene were fired from defendant's shotgun.

After waiving his *Miranda*[2] rights, defendant gave a statement to the police. In the statement, defendant indicated that he was in the parking lot where Knuckles, Jr. and Aikins's bodies were discovered. He explained that he saw a blue Avalanche truck[3] that appeared to be the same vehicle someone had shot at him from in November of 2011. He said that he "thought the person who shot [him] was there on the passenger side, so [he] shot in there." He also said that the first person he came across was the driver. Defendant then candidly admitted to using a .380 caliber pistol to fire seven or eight shots into the passenger side of the Avalanche. He said that afterward he ran back to his girlfriend's house. Defendant also admitted that he wrote codefendant a letter from jail, advising codefendant to hide the shotgun that codefendant was holding the night of the shooting. At trial, defendant conceded that he was responsible for the shooting, but argued that the evidence only supported convictions for voluntary manslaughter.

II. EXTRINSIC INFLUENCES ON THE JURY

Defendant first argues that he is entitled to a new trial because the jury was exposed to extraneous information that created a real and substantial possibility of prejudice, thereby depriving him of his constitutional rights under the Sixth Amendment. He also argues that the trial court erred in questioning the jurors about the affect the extraneous information had on their verdict. Because the errors were harmless beyond a reasonable doubt, we affirm the trial court's decision to ultimately deny defendant's motion for a new trial.

A. PROCEDURAL BACKGROUND

After the jury delivered its guilty verdict, defense counsel apparently spoke with some of the jurors. One of them apparently told defense counsel that defendant was a "bad man" because he had wanted to have a police officer killed. Defense counsel determined that the jury had inadvertently heard a portion of defendant's interview that the parties had agreed should be redacted. On August 15, 2013, defense counsel filed a motion for new trial, arguing that the

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[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] The police located a blue Chevrolet Avalanche truck in the garage of a vacant house. There were bullet holes in both front sides, the windows had been shot out, and there was blood on the seat. A shoe found near the truck was identified as belonging to Knuckles, Jr. Further, Knuckles, Jr.'s family identified the vehicle as belonging to Knuckles, Jr.'s father. Knuckles, Jr. had been driving the truck the night he was killed.

redacted information—statements suggesting that defendant was plotting to kill a police officer—had tipped the scales from first-degree murder to second-degree murder. The prosecutor argued that any error was harmless when viewed against the other evidence properly admitted against defendant, including the portion of defendant's interview where he admitted to walking up to the Avalanche and firing into the passenger side. Further, the prosecutor pointed out that defendant had not actually admitted to wanting to kill a cop during the interview. After hearing the arguments, the trial court granted defendant's motion for a new trial, reasoning that there was a risk of prejudice because a juror heard about defendant wanting to kill a police officer.

On September 3, 2013, the prosecution filed a motion for reconsideration, arguing that the jury's exposure to the extraneous information was harmless beyond a reasonable doubt and asking the court to take testimony or affidavits from the jurors to determine the affect of extraneous information. On October 18, 2013, the trial court entered an order setting a date to determine whether the extraneous information was harmless beyond a reasonable doubt.

On November 5, 2013, the trial court interviewed each juror individually in chambers to determine whether the extraneous information was actually received, how long it was available to the jury, the extent to which the jury discussed and considered it, whether the material was introduced before a verdict was reached, and whether the extraneous information affected the verdict. Based on the jurors' answers, the trial court vacated its October 18, 2013 order and denied defendant's motion for a new trial.

B. ANALYSIS

A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *People v Russell*, 297 Mich App 707, 715; 825 NW2d 623 (2012). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). Whether a jury's exposure to extraneous information denied defendant his constitutional rights necessarily involves a question of constitutional law. See *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). We review constitutional issues de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

"A defendant tried by jury has a right to a fair and impartial jury." *Budzyn*, 456 Mich at 88. "Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment." *Id.* To establish that the extrinsic evidence was error requiring reversal, the defendant (1) "must prove that the jury was exposed to extraneous influences" and (2) "must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict." *Id.* at 88-89. The second element is generally satisfied with the defendant's demonstration that "the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id.* at 89. In determining whether extrinsic information created a "real and substantial possibility of prejudice," a court may consider the following factors:

> (1) whether the material was actually received, and if so how; (2) the length of time it was available to the jury; (3) the extent to which the juror discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict. [*Id*. at 89 n 11 (quotation omitted).]

If the defendant meets his initial burden, "the burden shifts to the people to prove that the error was harmless beyond a reasonable doubt" by showing "that either the extraneous influence was duplicative of evidence produced at trial or the evidence of guilt was overwhelming." *Id*. at 89-90, citing *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994).

Here, while there is no dispute that the jury was exposed to extraneous information, defendant has failed to show that there is a "real and substantial possibility" that such information could have affected the jury's verdict because he cannot show that there is a "direct connection between the extrinsic material and the adverse verdict." *Budzyn*, 456 Mich at 88-89. Of the 11 jurors questioned by the trial court, four remembered hearing the police officer ask defendant about the threat to a police officer. Of those four, three stated that the extraneous information did not affect their decisions because they were satisfied that defendant was guilty of first-degree premeditated murder *before* they heard mention of the letter; the foreperson suggested that the *entire jury* had reached its decision before it heard the erroneously provided portion of the tape. Another juror admitted that the discussion about a police officer being threatened was important to her decision because "it just made you think that [defendant] could do it again," but that juror said that the jury did not discuss the threat as a group, and that she would have voted the same way had she not heard the conversation about the threat to a police officer. Moreover, all of the jurors explained that they had reached their respective decisions to convict defendant of first-degree premeditated murder based on his admission to shooting into the Avalanche without knowing who was actually inside because he thought the truck belonged to someone who had shot at him in an earlier incident. There is, therefore, no "real and substantial possibility" that the erroneously unedited portion of defendant's statement affected the jury's verdict. *Id*.[4] In addition, it is unlikely that the jury used the information to infer that

[4] Defendant argues that the trial court erred in questioning the jurors on the affect the extraneous information had on their deliberative process. MRE 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any

defendant was a bad man with a propensity to commit crimes. Although defendant was convicted of two-counts of premeditated murder and the weapons charges, he was acquitted of carjacking and two counts of armed robbery. His acquittal of those charges suggests that the jury very carefully considered the evidence against defendant and made a decision based on the evidence, not on their perception of defendant as a bad man with a propensity to commit crime.

Moreover, there was substantial evidence introduced at trial to support the jury's decision to convict defendant of first-degree premeditated murder such that defendant cannot show there is a direct connection between the extraneous information and the adverse verdict. *Id*. "The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). Premeditation and deliberation "may be inferred from the circumstances surrounding the killing." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation means "to think about beforehand," and deliberation means "to measure and evaluate the major facets of a choice or problem." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998) (quotation omitted). Both premeditation and deliberation may be established through evidence of "(1) the prior relationship of the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant's conduct after the homicide." *Unger*, 278 Mich App at 229. "To show first-degree premeditated murder, some time span between the initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation." *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003) (internal quotation marks and punctuation omitted). "Although there is no specific time requirement, sufficient time must have elapsed to allow the defendant to take a 'second look.' " *Plummer*, 229 Mich App at 300. In addition, to support a conviction under an aiding and abetting theory, the following elements must be established beyond a reasonable doubt:

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999).]

Here, defendant admitted that he saw the blue Avalanche parked in a parking lot, that he thought that he had been shot by an occupant of what he believed was the same truck, and that he

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> statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Assuming *arguendo* that the decision to question the jurors was improper, any error was harmless in light of the overwhelming untainted evidence of defendant's guilt. See *Budzyn*, 456 Mich at 89; see also MCL 769.26 ("No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case . . . for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.").

shot into the Avalanche using a .380-caliber semiautomatic pistol. Shell casings found at the scene of the shooting matched the .380-caliber semiautomatic pistol defendant fired while he fled from police a few days after the shooting. Even though defendant was ultimately mistaken about the identities of the occupants of the truck, defendant's statements speak directly to a prior relationship between defendant and the victims. They also speak to his actions before the shooting. Defendant stated that he "thought the person who shot [him] was . . . on the passenger side, so [he] shot there." He also said that he "went back to [the] car," shot in the passenger window "seven or eight" times with a .380-caliber handgun and then ran away. Thus, his own statements are relevant to establishing premeditation and deliberation. In addition, the circumstances of the killing are also evidence of premeditation and deliberation, *Unger*, 278 Mich App at 229, and the brutal way in which it was carried out—defendant with a high-caliber handgun, codefendant with a shotgun, and the two men indiscriminately firing into the Avalanche without knowing who was inside—suggests that defendant had an opportunity "to think about beforehand" and "to measure and evaluate the major facets of" his decision to shoot into the truck. *Plummer*, 229 Mich App at 300. Moreover, from jail, defendant wrote codefendant a letter warning him to discard the shotgun codefendant had used in the shooting, which is material postshooting conduct. See *Unger*, 278 Mich App at 229. Further, defendant's sudden flight from police following what originated as a domestic dispute call, is also relevant on the question of intent because a "defendant's attempt to conceal the killing can be used as evidence of premeditation." *Gonzalez*, 468 Mich at 641. In addition, evidence of a defendant's flight from the scene after the shooting "may indicate consciousness of guilt, although evidence of flight by itself is insufficient to sustain a conviction." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Finally, the evidence adduced at trial showed that defendant and codefendant were close friends who were together every day. As defendant and codefendant approached the parking lot on the night of the murders, defendant carried a .380-caliber semiautomatic pistol on his hip, and codefendant carried defendant's shotgun. As the self-proclaimed victim of an earlier shooting and, accordingly, between the two men, the one most interested in retribution, it can be inferred that defendant "intended the commission of the crime." *Carines*, 460 Mich at 758. Defendant's close friendship with codefendant, and the fact that defendant owned the shotgun codefendant fired, suggest that defendant asked or encouraged codefendant to fire the shotgun at the driver's side of the Avalanche. Also, defendant's post-arrest letter attempting to help codefendant evade arrest by concealing one of the murder weapons was an act "that assisted the commission of the crime." *Id*. Given the properly admitted evidence of defendant's guilt, the inadvertent failure to redact defendant's police interview was harmless beyond a reasonable doubt. *Budzyn*, 456 Mich at 89. Therefore, the trial court did not abuse its discretion when it denied defendant's motion for a new trial. *Russell*, 297 Mich App at 715.

Furthermore, viewing the evidence recited above in the light most favorable to the prosecution, we likewise find defendant's claim that there was insufficient evidence to support his convictions for first-degree murder to be without merit. See *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010).

III. EVIDENTIARY ERROR

Defendant next argues that the trial court abused its discretion in admitting evidence that defendant shot at a police officer during a separate incident. We disagree.

"A trial court's discretionary decisions concerning whether to admit or exclude evidence will not be disturbed absent an abuse of that discretion. When the decision involves a preliminary question of law[,] however, such as whether a rule of evidence precludes admission, we review the question de novo." *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010) (quotations omitted).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. Evidence of a defendant's flight from apprehension is admissible and probative "because it may indicate consciousness of guilt, although evidence of flight by itself is insufficient to sustain a conviction." *Coleman*, 210 Mich App at 4. Evidence that a defendant tried to flee or conceal his identity from the police is relevant to show consciousness of guilt. *People v Cutchall*, 200 Mich App 396, 401; 504 NW2d 666 (1993), overruled on other grounds by *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996). "The term 'flight' has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody." *Coleman*, 210 Mich App at 4.

Here, the evidence showed that defendant fled on foot from a Flint police officer, who followed defendant in his police cruiser. The evidence was particularly probative of defendant's guilt because defendant's aversion to contact with law enforcement—to the point that he considered it necessary to shoot at a police officer—was not proportionate to the reason the officer was originally called to defendant's girlfriend's house, a domestic dispute. Further, the evidence showed that the gun was found near defendant when he was arrested. The fact that he fired it was probative of the fact that it was his gun and not merely a gun dropped in the vicinity of defendant's arrest by someone else. While the evidence was prejudicial, "[a]ll relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded." *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005). "Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *Id.* at 614. Here, the evidence in question had substantial probative value as to defendant's flight and his possession of the gun. Accordingly, the trial court did not abuse its discretion in admitting the evidence. *Mardlin*, 487 Mich at 614.

IV. PROSECUTORIAL MISCONDUCT

Defendant next argues that the officer in charge, Cynthia Herfert, mischaracterized defendant's statements to her during the interview by suggesting that defendant "stopped, thought[,] and then decided to shoot into the passenger side of the vehicle," offending defendant's due-process rights, and that the prosecution committed misconduct by failing to correct Herfert's testimony. We disagree.

To preserve a due process issue for appellate review, a defendant must object in the trial court. *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007). Likewise, "[i]n order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *Bennett*, 290 Mich App at 475. Because defendant failed to object to Herfert's testimony regarding his interview, this issue is not preserved for appellate review. "Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting

substantial rights." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). A plain error affects a defendant's substantial rights if the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Unger*, 278 Mich App at 235. Reversal is not required "where a curative instruction could have alleviated any prejudicial effect." *Id.* "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *Id.*

"[A] conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). "Stated differently, a conviction will be reversed and a new trial will be ordered, but only if the tainted evidence is material to the defendant's guilt or punishment." *Id.* "Thus, it is the misconduct's effect on the trial, not the blameworthiness of the prosecutor, which is the crucial inquiry for due process purposes." *Id.* (internal quotation and punctuation omitted). "[A] prosecutor has an obligation to correct perjured testimony that relates to the facts of the case or a witness's credibility." *People v Gratsch*, 299 Mich App 604, 619; 831 NW2d 462 (2013), vacated on other grounds 495 Mich 876 (2013).

Here, on direct examination, Herfert testified that defendant told her that codefendant and he "did not make it" to the liquor store because, while they passed through the parking lot, defendant noticed a blue Avalanche truck, which was "the same type of . . . vehicle . . . that shot at him in November of 2011." Herfert testified that defendant told her that he had been shot in the arm in this earlier incident and, as a result, his arm was in a sling on the night of the shooting. As Herfert recounted, defendant "stated that he saw two people in the Avalanche. He walked by the driver's side, he stopped, thought[,] and then decided to shoot into the passenger side of the vehicle," using a .380-caliber semiautomatic pistol. However, review of the audio recording of the interview shows that defendant actually recounted the following. First, defendant indicated that he had been shot in November of 2011. He also said that when he and codefendant came upon the Avalanche in the parking lot, defendant "was under the impression that the guy that shot [him] was . . . in the" Avalanche. The truck was facing east, and defendant agreed that, as he and codefendant cut through the parking lot on their way to a liquor store, they first approached the driver's side of the truck. However, defendant "thought the person who shot [him] was . . . on the passenger side, so [he] shot in there." He also said he "went back to [the] car" and shot in the passenger window "seven or eight" times with a .380-caliber handgun before running away from the scene.

Accordingly, it is clear that in arguing that the prosecution had a duty to correct Herfert's testimony, defendant confuses perjury, which the prosecution has an affirmative duty to correct, *Gratsch*, 299 Mich App at 619, with an uncharitable summary of defendant's statements and conduct. That defendant both "thought" and "decided to shoot" are not disputed because defendant admitted as much in his interview. All that remains of Herfert's summary for defendant to attack, then, is whether defendant "stopped" before deciding to fire into the Avalanche, which is probative of the element of premeditation. See *Gonzalez*, 468 Mich at 641. Defendant was free to cross-examine Herfert on her use of the word "stopped," but did not. Defendant said that, while he and codefendant approached the Avalanche on the driver's side,

defendant "went back to [the] car" and fired into the window on the opposite side, where he thought his onetime assailant sat. If, during this process, defendant did not stop in a literal sense, the act of repositioning himself strongly suggested that defendant had time "between the initial thought and ultimate action . . . long enough to afford a reasonable person time to take a 'second look.' " *Gonzalez*, 468 Mich at 641. While the jury first became acquainted with defendant's interview through Herfert's testimony, the jury was provided with the entirety of the interview during their deliberations, at which point it was entitled to resolve questions concerning the weight of the evidence. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012). Herfert's testimony did not mischaracterize defendant's statements, as it was grounded in defendant's actual words and conduct. Accordingly, the prosecution did not commit misconduct in failing to correct Herfert's testimony, and defendant's due-process rights were not violated by Herfert's testimony.

V. CUMULATIVE ERROR

Finally, defendant argues that the cumulative effect of the claimed errors deprived him of a fair trial. We disagree.

"We review this issue to determine if the combination of alleged errors denied defendant a fair trial." *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). "The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted." *Id.* However, "[a]bsent the establishment of errors, there can be no cumulative effect of errors meriting reversal." *Id.* Here, defendant directs this Court to two alleged errors: (1) Herfert's direct-examination testimony concerning defendant's statements during his interview, and (2) the admission of evidence that defendant fired at a police officer while fleeing. However, as we do not find either of those issues to be erroneous, defendant is not entitled to relief on the ground that he was prejudiced by the "cumulative effect of several errors." *Id.*

Affirmed.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood